Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Court of International Trade

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This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 81-299)

Bonds

Approval of a carrier's bond, Customs Form 3587

A bond of a carrier for the transportation of bonded merchandise has been approved as shown below. The approval of the bond is temporary until July 12, 1982.

Dated: December 2, 1981.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Transitall Services, Inc., 2 N. Riverside Plaza, Chicago, Ill.; motor carrier; Washington International Ins. Co.	Nov. 2, 1981	Nov. 18, 1981	Chicago, Ill. $25,000

BON-3-03

GEORGE C. STEUART
(For Marilyn G. Morrison, Director,
Carriers, Drawback and Bonds Division).

(T.D. 81-300)

DRAWBACK CONTRACTS (RATES)

There follows an approved drawback contract (rate). Any person who can comply with the conditions of this contract may adhere to it by notifying a Regional Commissioner of Customs in writing of its intentions to do so and providing him with the following information:

1. Name and address of adherent;
2. Factories which will operate under the contract; and

3. If a corporation, the names of officers or persons with power of attorney who will sign drawback documents on behalf of adherent.

This contract is designed to simplify drawback procedures.

(DRA-1-213544)

Dated: December 3, 1981.

GEORGE C. STEUART
(For Marilyn G. Morrison, Director,
Carriers Drawback and Bonds Division.)

DRAWBACK CONTRACT UNDER 19 U.S.C. 1313(b) FOR ARTICLES MANUFACTURED WITH THE USE OF COMPONENT PARTS

Imported Merchandise or Drawback Products to be Designated as the Basis for Drawback on the Exported Articles

Component Parts Identified by Individual Part Numbers

Duty-Paid, Duty-Free or Domestic Merchandise of the Same Kind and Quality as That Designated Which Will Be Used in the Manufacture of the Exported Products

Component Parts Identified With the Same Individual Part Numbers as Those in the Column Immediately to the Left Hereof

The designated components will have been manufactured in accordance with the same specifications and from the same materials, and identified by the same part number as the substituted components. Further, the designated and substituted components are used interchangeably in the manufacture of the exported articles upon which drawback will be claimed. Specifications or drawings will be maintained and made available for Customs officers.

The imported merchandise which we will designate on our claims will be so similar in quality to the merchandise used in producing the exported articles on which we claim drawback that the merchandise used would, if imported, be subject to the same rate of duty as the imported designated merchandise.

Fluctuations in market value resulting from factors other than quality will not affect the drawback.

EXPORTED ARTICLES ON WHICH DRAWBACK WILL BE CLAIMED

The exported articles will have been manufactured in the United States using components described in the parallel columns above.

GENERAL STATEMENT

We manufacture for our own account. We may produce articles for the account of another or another manufacturer may produce for our account under contract within the principal and agency relationship outlined in T.D. 55027(2) and T.D. 55207(1).

PRODUCTION

The components described in the parallel columns will be used to manufacture new and different articles, having distinctive names, characters or uses.

MULTIPLE PRODUCTS—RELATIVE VALUES

Not applicable.

WASTE

We understand that no drawback is payable on any waste which results from the manufacturing operation. Unless the claim for drawback is based on the quantity of components appearing in the exported articles, we agree to keep records to establish the value (or the lack of value), the quantity, and the disposition of any waste that results from manufacturing the exported articles. If no waste results, we agree to keep records to establish that fact.

PROCEDURES AND RECORDS MAINTAINED

We will maintain records to establish:

1. The identity and specifications of the merchandise we designate;
2. The quantity of merchandise of the same kind and quality as the designated merchandise [1] we used to produce the exported articles;
3. That, within 3 years after receiving it at our factory, we used the designated merchandise to produce articles. During the same three-year period, we produced [2] the exported articles.

We realize that to obtain drawback it must be established that the completed articles were exported within 5 years after the importation of the imported merchandise.

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[1] If claims are to be made on an "appearing in" basis, the remainder of this sentence would read "appearing in the exported articles we produce."

[2] The date of production is the date an article is completed.

Our records establishing our compliance with these requirements will be available for audit by Customs during business hours. We understand that drawback is not payable without proof of compliance.

INVENTORY PROCEDURES

Our inventory procedures will show how we will satisfy the legal requirements discussed under the heading "Procedures and Records Maintained." We understand that if our records do not show that we satisfy those legal requirements, drawback cannot be paid.

BASIS OF CLAIM FOR DRAWBACK

Drawback will be claimed on the quantity of components used in producing the exported articles only if there is no waste in the manufacturing operation.

If there is no waste or if the manufacturer does not want to keep records of any waste involved, drawback may be claimed on the quantity of eligible components that appear in the exported articles.

If there is waste recovered from the manufacturing operation and records are kept which show the quantity and value (or lack of value) of the waste, drawback may be claimed on the quantity of eligible material used to produce the exported articles, less the amount of those components which the value of the waste would replace.

AGREEMENTS

We specifically agree that we will:

1. Comply fully with the terms of this statement when claiming drawback;
2. Open our factory and records for examination at all reasonable hours by authorized Government officers;
3. Keep our drawback related records and supporting data for at least 3 years from the date of payment of any drawback claim predicated in whole or in part upon this statement;
4. Keep this statement current by reporting promptly to the regional commissioner who liquidates its claims any changes in the number or locations of its offices or factories, the corporate name, or the corporate organization by succession or reincorporation;
5. Keep a copy of this statement on file for ready reference by employees and require all officials and employees concerned to familiarize themselves with the provisions of this statement; and,
6. Issue instructions to insure proper compliance with title 19, United States Code, sections 1313(b) and (i), part 22 of the Customs Regulations and this statement.

(T.D. 81-301)

Synopses of drawback decisions

The following are synopses of drawback rates issued June 10, 1981, to November 18, 1981, inclusive, pursuant to sections 22.1 through 22.5, inclusive, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313 (a) and (b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded, and the date on which it was forwarded.

(DRA-1-09 213777)

Dated: December 3, 1981.

GEORGE C. STEUART,
(For Marilyn G. Morrison, Director,
Carriers, Drawback and Bonds Division).

(A) Company: Allis-Chalmers Corp.

Section 1313(a) articles: Tractors, implements, combines, and various other machinery.

Section 1313(a) merchandise: Castings and forgings in rough or finished condition.

Section 1313(b) articles: Tractors, implements, combines, and various other machinery.

Section 1313(b) merchandise: Hot rolled steel plate; rough and finished castings and forgings.

Factories: Various factories as listed in manufacturer's statement.

Statement signed: June 23, 1981.

Basis of claim: Appearing in.

Rate forwarded to Regional Commissioner of Customs: Houston, August 20, 1981.

Revokes: T.D. 81-180-B.

(B) Company: BHK of America.

Section 1313(a) articles: Vinyl laminated parts.

Section 1313(a) merchandise: P.V.C. vinyl films; water based adhesive; wood and plastic dowels; crating lumber; particleboard.

Section 1313(b) articles: Vinyl laminated parts.

Section 1313(b) merchandise: P.V.C. vinyl films; water based adhesive; wood and plastic dowels, crating lumber; particleboard.
Factory: Mahwah, NJ.
Statement signed: April 28, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: New York, July 16, 1981.

(C) Company: Brown & Williamson Tobacco Corp.
Section 1313(a) articles: Cigarette tobacco in bulk or in packages; cigarette tobacco rolled into cigarettes.
Section 1313(a) merchandise: Filler tobacco; menthol.
Section 1313(b) articles: Cigarette tobacco in bulk or in packages; cigarette tobacco rolled into cigarettes; cigarette packages; smoking (pipe) tobacco in the form of granulated tobacco or cut-plug tobacco and packaging.
Section 1313(b) merchandise: Flue-cured tobacco; burley tobacco; raw sugar; cigarette paper; cigarette tipping paper; aluminum foil; menthol.
Factories: Louisville, KY; Petersburg, VA; Macon, GA; Winston-Salem, NC.
Statement signed: February 29, 1980.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Chicago, September 22, 1981.
Revokes: T.D. 51005–B as amended by T.D. 53047–A and T.D. 69–240–G.

(D) Company: Carolina Chemicals, Inc.
Section 1313(a) articles: Dialifor, in hydrocarbon solution.
Section 1313(a) merchandise: Dialifor, isolated.
Section 1313(b) articles: Torak Emulsifiable Concentrate.
Section 1313(b) merchandise: Dialifor, in hydrocarbon solution.
Factory: West Columbia, SC.
Statement signed: May 20, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, September 30, 1981.

(E) Company: Centronics Data Computer Corp.
Section 1313(a) articles: Printers; miniprinters; kits, units, and assemblies therefor.
Section 1313(a) merchandise: Various parts for printers and assemblies.

Section 1313(b) articles: Electronic printers 700 series.
Section 1313(b) merchandise: Pinch and tractor mechanisms for 700 series printers.
Factory: Hudson, NH.
Statement signed: March 16, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: New York, June 10, 1981.

(F) Company: Cummins Charleston, Inc.
Section 1313(a) articles: Internal combustion diesel engines.
Section 1313(a) merchandise: Component parts for diesel internal combustion engines.
Section 1313(b) articles: Internal combustion diesel engines.
Section 1313(b) merchandise: Crankshafts; cylinder blocks; connecting rods; cylinder heads.
Factory: Charleston, SC.
Statement signed: February 24, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Chicago, November 9, 1981.
Revokes: T.D. 80–154–D.

(G) Company: Dataproducts Corp.
Section 1313(a) articles: Printers and lower level sub-assemblies.
Section 1313(a) merchandise: Various parts of printers and sub-assemblies.
Section 1313(b) articles: Printers and lower level sub-assemblies.
Section 1313(b) merchandise: Various parts of printers and sub-assemblies.
Factories: Woodland Hills, CA (2).
Statement signed: June 4, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Los Angeles, October 8, 1981.
Revokes: T.D. 80–94–D.

(H) Company: Design Resources, Inc.
Section 1313(a) articles: Finished piece goods.
Section 1313(a) merchandise: Greige piece goods.
Section 1313(b) articles: Finished piece goods.
Section 1313(b) merchandise: Greige piece goods.
Factories: Through its agents operating under T.D.'s 55207(1) and/or 55207(2).

Statement signed: December 19, 1980.
Basis of claim: Used in, less valuable waste.
Rate forwarded to Regional Commissioner of Customs: New York, July 14, 1981.

(I) Company: Dodge Cork Company, Inc.
Section 1313(a) articles: Cork stopper assemblies.
Section 1313(a) merchandise: Cork blanks or stubs.
Section 1313(b) articles: Rubber cork sheets, slabs, blocks, rolls, mats, logs; composition cork sheets, slabs, blocks, rolls, mats, logs.
Section 1313(b) merchandise: Granulated (broken) cork.
Factory: Lancaster, PA.
Statement signed: May 21, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, August 4, 1981.
Revokes: T.D. 52215–F.

(J) Company: General Electric Co.
Section 1313(a) articles: Gas turbines and components, accessories, systems, sub-assemblies and parts thereof.
Section 1313(a) merchandise: Gas turbines (partially completed) and components, accessories, sub-assemblies and parts thereof.
Section 1313(b) articles: Gas turbines and components, accessories, systems, sub-assemblies and parts thereof.
Section 1313(b) merchandise: Gas turbines (partially completed) and components, accessories, sub-assemblies and parts thereof.
Factories: Schenectady, NY; Greenville, SC.
Statement signed: June 24, 1981.
Basis of claim: Used in as to finished merchandise; used in, less valuable waste as to partially finished merchandise.
Rate forwarded to Regional Commissioner of Customs: New York, July 16, 1981.
Revokes: T.D. 78–258–J.

(K) Company: Glen Raven Mills, Inc.
Section 1313(a) articles: Multilobal bright textured polyester yarn.
Section 1313(a) merchandise: Multilobal polyester yarn, nontextured.
Section 1313(b) articles: Multilobal bright textured polyester yarn.
Section 1313(b) merchandise: Multilobal polyester yarn, nontextured.
Factories: Newland and Altamahaw, NC.
Statement signed: June 4, 1981.
Basis of claim: Used in.

Rate forwarded to Regional Commissioner of Customs: Miami, June 16, 1981.
Revokes: T.D. 80–192–L.

(L) Company: Hercules, Inc.
Section 1313(a) articles: Dialifor, in hydrocarbon solution.
Section 1313(a) merchandise: Dialifor, isolated.
Section 1313(b) articles: Torak Emulsifiable Concentrate.
Section 1313(b) merchandise: Dialifor, in hydrocarbon solution.
Factories: Plaquemine, LA; and through its agents operating under T.D.s 55207(1) and/or 55027(2).
Statement signed: May 7, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, September 30, 1981.

(M) Company: Hewlett-Packard Co.
Section 1313(a) articles: Electronic assemblies, instruments, and systems.
Section 1313(a) merchandise: Various semiconductor devices.
Section 1313(b) articles: Electronic assemblies. instruments, and systems.
Section 1313(b) merchandise: Various semiconductor devices.
Factories: Various factories as listed in manufacturer's statement.
Statement signed: August 4, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, September 2, 1981.

(N) Company: Hewlett-Packard Co.
Section 1313(a) articles: Analytical instruments, computers, terminals, calculators, medical instruments, computer peripherals, and other electronic products.
Section 1313(a) merchandise: Liquid crystal displays (LCD).
Section 1313(b) articles: Analytical instruments, computers, terminals, calculators, medical instruments, computer peripherals, and other electronic products.
Section 1313(b) merchandise: Liquid crystal displays (LCD).
Factories: Various factories as listed in manufacturer's statement.
Statement signed: September 17, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, October 27, 1981.

(O) Company: Honeywell-Synertek, Inc.
Section 1313(a) articles: Semiconductor circuits (dice) on wafers.
Section 1313(a) merchandise: Silicon wafers.
Section 1313(b) articles: Semiconductor circuits (dice) on wafers.
Section 1313(b) merchandise: Silicon wafers.
Factory: Santa Clara, CA.
Statement signed: May 26, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, July 31, 1981.

(P) Company: The Indium Corporation of America.
Section 1313(a) articles: Indium ingots pure, indium wire, sheet foil and ribbon, indium alloys, indium and indium alloy preforms, and indium salts and plating baths.
Section 1313(a) merchandise: Indium metal ingots.
Section 1313(b) articles: Indium ingots pure, indium wire, sheet foil and ribbon, indium alloys, indium and indium alloy preforms, and indium salts and plating baths.
Section 1313(b) merchandise: Indium metal ingots.
Factory: Utica, NY.
Statement signed: August 31, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Boston, November 13, 1981.

(Q) Company: Intel Corp.
Section 1313(a) articles: Partially fabricated integrated circuits in die and wafer form; finished integrated circuits and semiconductor devices; finished systems and related equipment.
Section 1313(a) merchandise: High purity silicon wafers; packages; frames; lids; unfinished integrated circuits and semiconductor devices; finished integrated circuits and semiconductor devices.
Section 1313(b) articles: Partially fabricated integrated circuits in die and wafer form; finished integrated circuits and semiconductor devices; finished systems and related equipment.
Section 1313(b) merchandise: High purity silicon wafers; packages; frames; lids; unfinished integrated circuits and semiconductor devices; finished integrated circuits and semiconductor devices.
Factories: Chandler and Phoenix, AZ; Santa Clara (5), Sunnyvale (2), Santa Cruz, and Livermore, CA; Aloha and Hillsboro, OR.
Statement signed: October 7, 1981.
Basis of claim: Used in, less valuable waste.

Rate forwarded to Regional Commissioner of Customs: San Francisco, October 28, 1981.
Revokes: T.D. 81–45–J.

(R) Company: Kelsey-Hayes Co.
Section 1313(a) articles: Brake assemblies.
Section 1313(a) merchandise: Brake parts.
Section 1313(b) articles: Motor vehicle parts.
Section 1313(b) merchandise: Hot rolled steel sheet, strip, blanks and plate; hot and cold rolled forging bars; brake parts.

Factories: Romulus, Jackson and Brighton, MI; Mount Vernon, OH; Davenport, IA; Philadelphia, PA; Sedalia, MO.
Statement signed: June 8, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: New York, October 1, 1981.

(S) Company: Olin Ski Co., Inc.
Section 1313(a) articles: Snow skis.
Section 1313(a) merchandise: Rubber; phenolic; woven fiberglass; ink; ink thinner; ink retarder.
Section 1313(b) articles: Snow skis.
Section 1313(b) merchandise: Polyethylene; acrylonitrile butadiene styrene; fiberglass; wood platens; fleece; aluminum; carbon steel; polyurethane foam.
Factory: Middletown, CT.
Statement signed: April 3, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Boston, October 20, 1981.

(T) Company: Outboard Marine Corp.
Section 1313(a) articles: Outboard motors, lawnmowers, garden equipment, light industrial vehicles and parts, aluminum alloy die castings, and steel stampings.
Section 1313(a) merchandise: Cast iron alloy forgings, aluminum ingot alloys, stainless steel sheets and bar stock, and various parts.
Section 1313(b) articles: Outboard motors, lawnmowers, garden equipment, light industrial vehicles and parts, aluminum alloy die castings, and steel stampings.
Section 1313(b) merchandise: Cast iron alloy forgings, aluminum ingot alloys, stainless steel sheets and bar stock, and various parts.

Factories: Waukegan and Galesburg, IL; Milwaukee and Beloit, WI; Lincoln, NE.
Statement signed: June 9, 1980.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Chicago, November 5, 1981.
Revokes: T.D. 54204–A.

(U) Company: Signetics Corp.
Section 1313(a) articles: Finished integrated circuits.
Section 1313(a) merchandise: Unfinished semiconductor devices.
Section 1313(b) articles: Finished integrated circuits.
Section 1313(b) merchandise: Unfinished semiconductor devices.
Factories: Sunnyvale and Sacramento, CA.
Statement signed: June 4, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, July 23, 1981.

(V) Company: Sundstrand Corp., Hydraulics Div.
Section 1313(a) articles: Fuel oil pumps.
Section 1313(a) merchandise: Additional fuel oil pump parts.
Section 1313(b) articles: Fuel oil pumps.
Section 1313(b) merchandise: Additional fuel oil pump parts.
Factory: Rockford, IL.
Statement signed: April 24, 1981.
Basis of claim: Used in under section 1313(a); Used in, less valuable waste under section 1313(b).
Rate forwarded to Regional Commisioner of Customs: Chicago, August 11, 1981.

(W) Company: Sundstrand Corp., Sundstrand Aviation Operations Div.
Section 1313(a) articles: Aircraft electrical, hydraulic and mechanical systems and components.
Section 1313(a) merchandise: Various parts for aircraft electrical, hydraulic, and mechanical systems and components, finished and unfinished.
Section 1313(b) articles: Aircraft electrical, hydraulic and mechanical systems and components.
Section 1313(b) merchandise: Various parts for aircraft electrical, hydraulic, and mechanical systems and components, finished and unfinished.

Factories: Rockford, IL; Denver, CO; Fullerton, CA.
Statement signed: October 23, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Chicago, November 3, 1981.
Revokes: T.D. 81–180–V.

(X) Company: Textron, Inc., Homelite Div.
Section 1313(a) articles: Chain saws, stringtrimmers, brushcutters, construction equipment and spare parts.
Section 1313(a) merchandise: Component parts.
Section 1313(b) articles: Chain saws, stringtrimmers, brushcutters, construction equipment and spare parts.
Section 1313(b) merchandise: Component parts.
Factories: Gastonia and Charlotte, NC; Greer, SC.
Statement signed: October 27, 1980.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, August 31, 1981.
Revokes: T.D. 76–328–A.

(Y) Company: UOP Inc., Norplex Div.
Section 1313(a) articles: Bonding sheets; pressed laminates.
Section 1313(a) merchandise: Resins.
Section 1313(b) articles: Bonding sheets; pressed laminates.
Section 1313(b) merchandise: DiMethylformamide solvent (DMF).
Factories: La Crosse and Black River Falls, WI; Franklin, IN; Postville, IA.
Statement signed: July 31, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Chicago, November 18, 1981.

(Z) Company: Unit Rig & Equipment Co.
Section 1313(a) articles: Off-highway dump trucks; engine modules.
Section 1313(a) merchandise: Diesel engines; tires; front axle castings; front axle forgings.
Section 1313(b) articles: Off-highway dump trucks; engine modu les
Section 1313(b) merchandise: Diesel engines; tires; front axle castings, front axle forgings.
Factories: Tulsa, OK: Conroe, TX.
Statement signed: November 21, 1980.
Basis of claim: Appearing in.

Rate forwarded to Regional Commissioner of Customs: Houston, August 13, 1981.

Exxon Corp., Exxon Chemical Company U.S.A. Division operating under T.D. 80–192–H has changed its name to Exxon Chemical Americas, a division of Exxon Chemical Company.

Kalamazoo Spice Extraction Co. operating under T.D. 54990–I, as amended by T.D. 66–60–K and T.D. 72–218–H, has changed its name to Kalsec, Inc.

(T.D. 81–302)

Foreign Currencies—Daily Rates for Countries not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372 (c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

(11/3/81, Bank Holiday, Countries take 11/2/81 rate)

Argentina peso:	
November 2–5, 1981	$0.000160
November 6, 1981	.000159
Chile peso:	
November 2–6, 1981	$0.025575
Colombia peso:	
November 2–5, 1981	$0.017683
November 6, 1981	.017452
Greece drachma:	
November 2–4, 1981	$0.017809
November 5, 1981	.017889
November 6, 1981	.017825
Indonesia rupiah:	
November 2–6, 1981	$0.001582
Israel shekel:	
November 2, 1981	$0.070472
November 4, 1981	.070972
November 5–6, 1981	.070472
Peru sol:	
November 2–5, 1981	$0.002179
November 6, 1981	.002119

South Korea won:
November 2–6, 1981 ..... $0.001453

(LIQ-01-03 O:C:E)

Dated: December 1, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

(T.D. 81-303)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 81-269 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

(11/3/81, Bank Holiday, Countries take 11/2/81 rate)

Austria schilling:
November 4, 1981 ..... $0.064516
November 5, 1981 ..... .064267
Brazil cruziero:
November 2–6, 1981 ..... $0.008709
Germany deutsche mark:
November 4, 1981 ..... $0.452080
Hong Kong dollar:
November 2, 1981 ..... $0.171527
November 4, 1981 ..... .174734
November 5, 1981 ..... .176211
November 6, 1981 ..... .176149
Netherlands guilder:
November 2, 1981 ..... $0.408163
November 4, 1981 ..... .410593
November 5, 1981 ..... .407664
November 6, 1981 ..... .408831

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Switzerland franc:	
November 2, 1981	$0. 554785
November 4, 1981	. 559284
November 5, 1981	. 557724
November 6, 1981	. 558503

(LIQ-03-01 O:C:F)

Dated: December 1, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

Decisions of the United States Court of Customs and Patent Appeals

NATIONAL SUGAR REFINING CO. *v.* U.S., No. 80-31

1. JUDGMENT OF COURT OF INTERNATIONAL TRADE—EXEMPTION FROM DUTY OF RAW SUGAR UNDER PRESIDENTIAL PROCLAMATION

Court of International Trade judgment sustaining the Government's position that the subject sugar was not exempt from increased duty under item 155.20, Tariff Schedules of the United States (TSUS) by Presidential Proclamation (PP) 4466 issued October 4, 1976 viz. 41 Fed. Reg. 44031 (1976), modifying PP 4463 issued September 21, 1976 viz. 41 Fed. Reg. 41681 (1976), affirmed.

2. ID.—DECISION OF CCPA IN *Westway* v. *U.S.* (1980) CONSTRUING PRESIDENTIAL PROCLAMATION

In *Westway Trading Corp.* v. *United States*, 68 CCPA ——, C.A.D. 1254, 633 F. 2d 1388 (1980), this court, construing PP 4466, held that "exported to the United States before 12:01 a.m. * * *, September 21, 1976.", expressed a Presidential intent to exempt only sugar which had finally departed the country of exportation for the United States before that time and date.

3. ID.

We see, and have been shown, no reason to depart from the construction of PP 4466 adopted in *Westway*.

4. ID.—INTENTION TO EXEMPT

Nothing in PP 4466 indicates any intent to exempt, for any reason, sugar exported after 12:01 a.m. on September 21, 1976, whether that sugar was earlier contracted for, laden ready to depart, had its title passed, or was otherwise treated.

5. ID.—FILING OF PRESIDENTIAL PROCLAMATION

That PP 4463 was filed with the Federal Register after the vessel sailed from Dominican Republic is irrelevant. PP 4463's provision for increased duties was applicable to sugar entered for consumption into the United States and bore no relation to dates of exportation.

F. 2d

NATIONAL SUGAR REFINING COMPANY, APPELLANT v. THE UNITED STATES, APPELLEE

No. 80–31

United States Court of Customs and Patent Appeals, December 3, 1981, Appeal from United States Court of International Trade, C.D. 4849.

[Affirmed]

Robert D. Whoriskey and *Edward A. Kotite*, attorneys for appellant.

Thomas S. Martin, Acting Asst. Atty. General, *David M. Cohen*, Director, *Joseph I. Liebman*, Attorney-in-charge and *Saul Davis*, attorneys for appellee.

[Oral argument on October 5, 1981 by *Edward A. Kotite* for appellant and *Saul Davis* for appellee.]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, MILLER, and NIES, *Associate Judges*.

MARKEY, *Chief Judge*.

[1] National Sugar Refining Company (National Sugar) appeals[1] from the judgment of the United States Court of International Trade[1] granting the United States' cross-motion for summary judgment and sustaining its position that the subject sugar was not exempt from increased duty under item 155.20, Tariff Schedules of the United States (TSUS) by Presidential Proclamation (PP) 4466 issued October 4, 1976 viz. 41 Fed. Reg. 44031 (1976), modifying PP 4463 issued September 21, 1976 viz. 41 Fed. Reg. 41681 (1976). We affirm.

BACKGROUND

Raw sugar was laded at the port of Rio Haina, Dominican Republic, on September 20, 1976. It finally departed that port for the United States at 7:30 a.m., local time, September 21, 1976, and was entered for consumption at Philadelphia in late October 1976.

PP 4463 was issued on September 21, 1976, increasing the duty on sugar entered, or withdrawn from warehouse, for consumption on or

[1] The judgment of the United States Customs Court, now the United States Court of International Trade, is reported at —— Cust. Ct. ——, C.D. 4849, 488 F. Supp. 907 (1980).

after that date.[2] PP 4463 was filed with the Federal Register at 3:39 p.m. on September 21, 1976. On October 4, 1976, PP 4466 was issued, exempting from that increase sugar "exported to the United States before 12:01 a.m. * * *, September 21, 1976." [3]

When the sugar was entered for consumption, the Customs Service imposed the increased duty provided by PP 4463. National Sugar protested that assessment, urging that the sugar was exempt under PP 4466 from the increase.

Judge Boe of the Court of International Trade sustained the assessment, reasoning that because the sugar finally departed the Dominican Republic after 12:01 a.m., September 21, 1976, it was not "exported * * * before 12:01 a.m. * * *, September 21, 1976" within the intendment of PP 4466, citing *Westway Trading Corp.* v. *United States*, 83 Cust. Ct. ——, C.D. 4826, 483 F. Supp. 300 (1979). *Westway* was affirmed after judgment was issued below in this case. *Westway Trading Corp.* v. *United States*, 68 CCPA ——, C.A.D. 1254, 633 F. 2d 1388 (1980).

ISSUE

Whether the subject sugar is exempt under PP 4466 from the increased duties imposed by PP 4463.

OPINION

National Sugar says the vessel was laden, bills of lading were issued, title passed, and the vessel was made ready to sail, all by 8:40 p.m., September 20, 1976; that but for local navigational restrictions prohibiting departure at night, the vessel would have departed the Dominican Republic before September 21, 1976; and that, because it had done all within its power to achieve exportation, the sugar was

[2] PP 4463 (September 21, 1976) (T.D. 76-309):

* * * * * * * *

NOW, THEREFORE, I, GERALD R. FORD, * * * do hereby proclaim until otherwise superseded by law:

* * * * * * * *

B. The rates of duty in rate column numbered 1 for items 155.20 and 155.30 of Subpart A, Part 10, Schedule 1 of the TSUS, are modified, and the following rates are established:

155.20	1.9875¢ per lb. less 0.028125¢ per lb. for each degree under 100 degrees * * * but not less than 1.284375¢ per lb.
155.30	Dutiable on total sugars at the rate per lb. applicable under Item 155.20 to sugar testing 100 degrees.

C. The provisions of this proclamation shall become effective with respect to articles entered, or withdrawn from warehouse, for consumption on and after the date of this Proclamation and shall remain in effect until the President otherwise proclaims or until otherwise superseded by law.

[3] PP 4466 (October 4, 1976) (T.D. 76-309):

* * * * * * * *

NOW, THEREFORE, I GERALD R. FORD, * * * [in order to alleviate hardships which may result from increasing the rate of duty with respect to certain goods that were exported prior to the effective date of that Proclamation,] do hereby proclaim that paragraph C of Proclamation No. 4463 of September 21, 1976, is hereby amended to read as follows:

C. The Provisions of this Proclamation shall become effective with respect to articles entered, or withdrawn from warehouse, for consumption on and after September 21, 1976, and shall remain in effect until the President otherwise proclaims or until otherwise superseded by law. However, the provisions of this Proclamation shall not be effective with respect to articles exported to the United States before 12:01 A.M. (U.S. Eastern Daylight Savings Time), September 21, 1976, provided that such articles are entered, or withdrawn from warehouse, for consumption on or before November 8, 1976.

"exported to the United States" before 12:01 a.m., September 21, 1976 within the intendment of PP 4466. National Sugar also says its having contracted to buy the sugar before September 21, 1976 is an additional basis for applying the exemption of PP 4466.

Citing Headnote 2, Subpart A, Part 10, Schedule 1 of the TSUS, National Sugar says PP 4463 was intended to protect the interests of domestic sugar producers by creating an economic incentive to purchase domestic sugar. Because imposition of a higher duty on those already contractually bound to buy foreign sugar when PP 4463 issued would not further that intent, National Sugar says the President must have intended by PP 4466 to relieve such persons of the increased duty.

Finally, National Sugar urges that because the first notice of PP 4463, that is, its filing with the Federal Register, occurred after the vessel had sailed from the Dominican Republic, PP 4463 should not be "retroactively" applied.

In response, the Government cites *Westway Trading Corp.*, *Supra.*, in which [2] this court, construing PP 4466, held that "exported to to the United States before 12:01 a.m. * * *, September 21, 1976.", expressed a Presidential intent to exempt only sugar which had finally departed the country of exportation for the United States before that time and date.

National Sugar maintains that *Westway* is either in error or distinguishable because it did not discuss the protection of domestic producers intended in PP 4463. The ultimate issue in *Westway*, however, —construction of PP 4466—was identical to that presented here. [3] We see, and have been shown, no reason to depart from the construction of PP 4466 adopted in *Westway* and applied by judge Boe in this case.

National Sugar's assertion that PP 4466 was intended to provide relief to those who contracted to buy foreign sugar before September 21, 1976, or whose sugar was laded and ready for exportation before that date, is contradicted by the clear language of the proclamation which exempts only sugar "exported to the United States" before 12:01 a.m. on September 21, 1976. The term "exported" has been uniformly interpreted to mean that merchandise so described has actually, finally departed the country of exportation. *See Westway supra. See also Irvine* v. *Redfield*, 64 U.S. 170 (1859); *Sampson* v. *Peaslee*, 61 U.S. 571 (1857). There is no evidence that the President intended a different meaning here. On the contrary, it is reasonable to infer that the President was aware of the uniform interpretation of "exported" when he used that term in PP 4466, and that appropriate language

would have been included if the Presidential intent had been that asserted by National Sugar.

National Sugar says it presents here a question not confronted in *Westway*, that is, how may PP 4463 and PP 4466 be interpreted to insure that both will have their intended effect. It is undisputed that PP 4463 was intended to protect domestic producers. As indicated above and in *Westway*, PP 4466 was intended to exempt only sugar that had been *exported* before 12:01 a.m. on September 21, 1976. If application of PP 4466 to a particular shipment contracted for before the effective date of PP 4463 did not appear to fully meet the protective intent of PP 4463 in that particular instance, it would not necessarily follow that the present interpretation of "exported" creates a conflict between the proclamations. First, secondary purchasers may be led to prefer domestic sugar over that particular shipment because of the higher duty imposed when it was entered. Second, that National Sugar's contract removed it as a purchaser of that amount of sugar on the domestic market at the time of the contract bears no relation to the intent of PP 4463 of protecting domestic producers against entries occurring after its effective date. Finally, [4] nothing in PP 4466 indicates any intent to exempt, for any reason, sugar exported after 12:01 a.m. on September 21, 1976, whether that sugar was earlier contracted for, laden, ready to depart, had its title passed, or was otherwise treated. Thus the present interpretation of PP 4463 and PP 4466 presents no impediment to achievement of the intended effect of both.

[5] That PP 4463 was filed with the Federal Register at 3:39 p.m., and thus after the vessel had sailed, is irrelevant. PP 4463's provision for increased duties was applicable to sugar entered for consumption into the United States and bore no relation to dates of exportation. The sugar here involved was entered for consumption into the United States well after the effective date (September 21, 1976) of PP 4463. Thus PP 4463 was not, as appellant argues, "retroactively" applied to the present entry. The introductory paragraphs of PP 4466 refer to the "effective date" of PP 4463, and the first sentence of the amendment proclaimed in PP 4466 makes the increased duties of PP 4463 applicable to articles entered "on or after September 21, 1976". The provision exempting articles from increased duty on the basis of exportation, however, does not refer to any "effective date" of PP 4463. The exemption provision based on exportation includes a specific date and time before which exportation must have occurred. The provision thus stands on its own and is unaffected by whatever time of day on which the increased duty provisions of PP 4463 became effective.

CONCLUSION

Because the sugar involved here was entered for consumption after the effective date of PP 4463 it was subject to the increased duty imposed by that proclamation. Because the sugar did not depart, i.e., was not exported from, the Dominican Republic until 7:30 a.m., September 21, 1976, it remained subject to the increased duty imposed by PP 4463 and was not exempted by PP 4466. Accordingly, the judgment of the Court of International Trade is *affirmed.*

United States Court of International Trade

Decision of the United States Court of International Trade

Slip Op. 81–108

HUTCHINSON BROKERS, INC., A/C THOS. P. GONZALEZ CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 79–8–01298

Before RE, *Chief Judge.*

CHILI PEPPERS

Chili peppers imported from Mexico were classified as unground anaheim and ancho peppers under item 161.80 of the Tariff Schedules of the United States, and assessed with duty at the rate of 5 cents

per pound. Plaintiff contested the classification claiming that the imported chili peppers were other than anaheim and ancho peppers, and properly classifiable under item A161.83, duty free under the Generalized System of Preferences. Held: Since plaintiff did not succeed in overcoming the presumption of correctness attached to the classification, the action is dismissed.

Common Meaning—Burden of Proof

Plaintiff had the burden of establishing that the imported chili peppers do not fall within the common meaning of the term "anaheim" peppers as claimed. Plaintiff's reliance upon the terminology employed on the invoices that they were "chilaca" chili peppers, and the disputed testimony of its witness, were not sufficient to discharge its burden.

Common Meaning—Expert Testimony

Although the expert testimony regarding nomenclature and characteristics of the imported merchandise was in direct conflict, the court found that the testimony of defendant's witness in support of the presumption that the imported merchandise is within the common meaning of the term "anaheim" peppers, as used in item 161.80 of the tariff schedules, was competent, reliable and credible.

Commercial Designation

Proof of commercial designation is a question of fact to be established in each case. Since plaintiff posited that the commercial meaning of a tariff term differed from its common meaning, plaintiff had the burden of proof on that issue. Thus, plaintiff had the burden of establishing that, as used in the trade at the time of the enactment of the tariff schedules, the term "anaheim" peppers had a meaning which was general (extending over the entire country), definite (certain of understanding), and uniform (the same everywhere in the country). The pronounced differences, among other things, in the nomenclature, distinctions, and characteristics of anaheim chili peppers, offered by both of the expert witnesses, demonstrate that there was no definite, general, and uniform trade understanding of that term.

[Judgment for defendant.]

(Decided November 23, 1981)

Glad & White (*Edward N. Glad* at the trial; *Steven B. Lehat* on the briefs) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Jerry P. Wiskin* at the trial and on the brief), for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain dried, unground chili peppers imported from Mexico. The merchandise was described on the invoices as "Chili Seco Chilaca" peppers.

The chili peppers were classified by the customs officials as unground anaheim and ancho peppers pursuant to item 161. 80 of the Tariff Schedules of the United States. Consequently, they were assessed with duty at the rate of 5 cents per pound.

Plaintiff protests the classification and claims that the merchandise should have been properly classified as other capsicum or cayenne or red peppers, not ground, under item A161. 83 of the tariff schedules. If the imported chili peppers are properly classifiable under the claimed provision, they are entitled to be admitted free of duty by virtue of the Generalized System of Preferences.

The pertinent items of the tariff schedules provide as follows:

Schedule 1, Part 11, Subpart B, TSUS:		
Pepper:		
* * * * * * *		
Capsicum or cayenne or red:		
Not ground:		
161. 80	Anaheim and ancho	5¢ per lb.
* * * * * * *		
A161. 83	Other	[Free]

The record consists of the testimony of three witnesses, one called by plaintiff and two by defendant. It also contains twelve exhibits, seven introduced by plaintiff and five by defendant.

At the trial, the parties stipulated that the subject merchandise was not ancho peppers; that the requirements of the Generalized System of Preferences have been met; and that, in order to prevail, plaintiff need only prove that the merchandise is not anaheim peppers.

It was further stipulated that plaintiff's exhibit 6 is a correct translation of the first full paragraph of page 11 of plaintiff's exhibit 5, and that California and California Wonders are two different kinds of peppers.

Plaintiff contends that it has made a *prima facie* showing that the imported chili peppers do not fall within the common meaning, or commercial designation, of the term "anaheim" peppers, but are chilaca peppers, and, further, that defendant has failed to controvert plaintiff's evidence.

Defendant maintains that the chili peppers were properly classified as anaheim peppers, and that plaintiff has failed to establish any commercial designation for them.

As in all customs cases, plaintiff has the burden of overcoming the

statutory presumption of correctness which attaches to the government's classification pursuant to 28 U.S.C. § 2635 (1976). Thus, the question presented is whether plaintiff has borne its burden of proving that the imported chili peppers are other than "anaheim" peppers, as that term is used in item 161.80 of the tariff schedules.

Based upon a careful study of the record, and its assessment of the competency and credibility of the witnesses, the court has concluded that the presumption of correctness attaching to Customs' classification of the imported merchandise has not been rebutted. Plaintiff has not sustained its burden of proving that the classification by Customs was erroneous and that its claimed classification is correct.

It is apparent that the resolution of the issue requires a determination of the common meaning of "anaheim" peppers, as that term is used in item 161.80 of the tariff schedules.

It is fundamental that, in the absence of a special commercial designation, the language of a tariff statute is to be construed in accordance with its common meaning. Further, the common meaning of a word is a matter of law to be determined by the court, and, in making that determination, the court may rely upon its own understanding of the word or term used, and may consult standard lexicographic and scientific authorities. The testimony of witnesses respecting common meaning is advisory only and has no binding effect on the court. *Mattel, Inc.* v. *United States*, 65 Cust. Ct. 616, 619, C.D. 4147 (1970). See also, e.g., *United States* v. *O. Brager-Larsen*, 36 CCPA 1, 3, C.A.D. 388 (1948); *West Coast Cycle Supply Co.* v. *United States*, 66 Cust. Ct. 500, 503, C.D. 4242 (1971).

The evidence of record has been considered by the court in light of the foregoing legal principles.

The witnesses differ as to their respective backgrounds and experience.

Plaintiff's witness, Mr. Thomas P. Gonzalez, since 1954, was president of the Thomas P. Gonzalez Corp., the ultimate consignee. The firm imports and exports agricultural products, including twenty to thirty varieties of chili peppers. As president of the corporation, Mr. Gonzalez is responsible for all of its buying and selling. He has been buying chili peppers such as those at bar for almost fifty years. Mr. Gonzalez is frequently required to travel to Mexico where the various chili pepper varieties are grown. He has become familiar with the varieties of chili peppers by observing them being planted, grown, cultivated, harvested, dried and packed, selected, and cleaned and packed.

Defendant's witness, Dr. Roy M. Nakayama, is professor of horticulture at New Mexico State University. From that university he has a bachelor of science degree in agricultural botany, and a

master's degree from Iowa State University in plant pathology. He also holds a Ph.D. degree in plant breeding, horticulture, and plant pathology from Iowa State University. Dr. Nakayama has authored a number of research reports on the culture and identity of chili peppers, and is a member of the National Pepper Research Workers Group and the American Society for Horticultural Science.

Dr. Nakayama was employed by the California State Department of Agriculture for a period of two years where his primary responsibility was the observation of the planting of crops, including chili peppers, for disease investigations. His specialty encompasses chili pepper research, agricultural practices, chili variety development and identification, and consultation with industry and growers. His grower consultation relates to the culture and identity of different chili varieties. Dr. Nakayama also works with the New Mexico Crop Improvement Association to certify chili varieties as to true name. In the performance of his duties, he has traveled in the United States, some Central and South American countries, and various parts of Mexico. While in Mexico, he has oberved the planting of chili pepper seeds, and has consulted with farmers and others involved in the growing of chili peppers.

The conflicting testimony of the witnesses follows:

Mr. Gonzalez identified plaintiff's exhibits 1 and 2 as chili pepper samples taken from particular entries before the court. He was of the opinion that these samples are chilaca chili peppers. On the other hand, Dr. Nakayama pointed out that it is difficult to determine a chili variety without regional information because of the effect that this circumstance has on the size and shape of a particular variety. However, he stated that, based on texture and color, an identification could be made. Using this criteria, Dr. Nakayama testified that the chili pepper samples in plaintiff's exhibits 1 and 2 belong to the "Anaheim (California)" group of peppers.

In order to identify the particular variety of chili peppers, Mr. Gonzalez testified that one must consider shape, color, pungency, size and price. He stated, however, that the level of maturity of a chili pepper when it is picked will affect its color and size. He added that pungency encompasses both taste and odor, and that price is determined by the amount of color content and heat units which a given chili possesses, i.e., more color content and less heat units usually lead to a higher price.

Dr. Nakayama testified that the factors to be considered in identifying chili peppers include: shape; configuration; length; width; texture of the fresh pod, i.e., rough or indented; dried pod texture, i.e., smooth or wrinkled; and color of the dehydrated pod. Color may be affected by maturity and manner of storage, and storage is capable

of causing color deterioration. A very high dehydration temperature results in a darker than normal color for a given variety of chili peppers.

With respect to anaheim chili peppers, Mr, Gonzalez testified that their seed originated in Anaheim, California, and that most of them are grown in California, and a few in Mexico. He stated that the size of anaheim chili peppers, though variable, is generally the same; they do not vary considerably in shape; and their color ranges from bright red to dark, light, or medium, including reddish brown. Pungency in chili peppers is expressed in scovel heat units of which anaheim peppers have very few. The witness indicated, however, that pungency in itself is not a sufficient criterion for distinguishing between kinds of chili peppers.

In contrast, Dr. Nakayama testified that anaheim chilies are grown commercially in the United States in the central part of Baja, California, and in Sonora State, California, and in Mexico, in the northern part of Chihuahua State. He reaffirmed that anaheim chilies vary considerably in size, shape, and pungency depending upon the area where they are grown. He further testified that the terms "anaheim" and "California" are synonymous in the chili pepper industry; that he has grown anaheim chili peppers, and also what his seed supplier refers to as "Anaheim (California)." The witness stated that in the United States, the term "Anaheim (California)" chili encompasses a pepper which upon drying has a smooth surface with a red to reddish brown color range.

Plaintiff's exhibit 4 was identified as the frontispiece and pages 38 and 39 of a catalogue published by P.S. Petoseed, a commercial seed source, illustrating the anaheim and the college 64L chili peppers. In the opinion of Mr. Gonzalez, the college 64L pepper is the same as the chilaca, except that it is grown in the State of California rather than in Mexico. When asked on cross-examination whether or not he knew that the Petoseed company developed the college 64L pepper, he replied that he did not know who developed it. Also, when asked whether the college 64L pepper was derived from the anaheim pepper, the witness responded that "it could have, in criss-crossing." He added, however, that that circumstance alone would not make it a form of anaheim pepper.

According to Dr. Nakayama, the college 64L pepper was developed by the Petoseed company, and is a strain of the college 64 pepper. He was involved in the development of the college 64 pepper, and had observed the college 64L in its various plantings. He testified that both of these peppers belong to the "Anaheim, California" group of chili peppers. He did not know whether the college 64L and chilaca chilies were the same since he never heard the term "chilaca" used in

the United States or Mexico when referring to chili peppers. In Dr. Nakayama's opinion, if the chilaca pepper were known in the United States as a college 64L pepper, as testified by Mr. Gonzalez, then the chilaca pepper would fall into the anaheim group of chili peppers. He further stated that crossbreeding results in a new variety of chili, different from either parent in physical appearance.

As to the differences between anaheim and chilaca chilies, Mr. Gonzalez testified that they are similar in appearance but different in pungency, size, color, texture and price. He stated that the anaheim chili was larger in length, less pungent, smoother in texture, brighter red in color, and usually more expensive. He emphasized, however, that size, color, and pungency were the most significant differences between the two kinds of chilies.

Defendant's exhibit A was identified by Mr. Gonzalez as the contract of purchase for the merchandise at bar, together with the bank guarantee to the growers for the value of the chili peppers they were to ship. The merchandise is described in the purchase agreement as "Chile Seco Calidad F.R., Pasilla y California," and in the bank guarantee as "Chile Seco Variedades Pasilla y California de Calidad F.R." When asked what varieties of chili peppers are indicated in those documents, Mr. Gonzalez testified that they were pasilla and California chili peppers. In explaining the reference to California chilies in those documents, he stated that the Mexican farmer calls the chilaca chili by that name.

However, Dr. Nakayama testified that he has worked with California chili peppers, and that in the United States the anaheim chili pepper is referred to as a California type pepper. He added that, in regard to chili peppers, the terms "California" and "anaheim" are synonymous.

In an effort to support the testimony of its witness, plaintiff introduced into evidence certain publications. Plaintiff's exhibit 5 is a photocopy of publication No. 15 from the National Institute of Agricultural Investigations in Mexico, dated December 1966, and exhibit 6 is an authenticated translation of the first full paragraph of page 11 of that exhibit. According to this writing, chilaca is one of the principal types and varieties of chili cultivated in Mexico, and anaheim chili is one of the varieties introduced from the United States and now cultivated in Mexico. Plaintiff maintains that this affirms the testimony of Mr. Gonzalez with respect to the differences between anaheim and chilaca chili peppers in the United States market, and, further, that it coincides with the common usage of the term "anaheim" in this country. Consequently, plaintiff argues that the witness' identification of the imported merchandise as "chilaca," and not "anaheim,"

shows *prima facie* that the importations do not fall within the common meaning of the term "anaheim," but are "chilaca."

Plaintiff adds that Mr. Gonzalez' testimony as to the common meaning of "anaheim" versus "chilaca" chilies is further bolstered by exhibit 7, the New Mexico State University booklet entitled *Green Chili Recipe Fiesta*, which states that the anaheim variety of chili from California is mild. Plaintiff asserts that this statement confirms the testimony of its witness to that effect.

In its brief, plaintiff suggests that the testimony of Mr. Gonzalez as to anaheim pungency and growth in Mexico is supported by the *Sunset Mexican Cook Book* (13th printing, December 1973, Lane Books, Menlo Park, Calif.). As to pungency, it states that "the larger the chili the milder the flavor usually is," and "the flavor of California chilies ranges from mild and sweet like a bell pepper, to mildly hot." As to the area of cultivation of California (anaheim) peppers, it states: "These peppers are a variety cultivated principally in the United States and not often seen in Mexico, although very similar types called by several names are grown there." Hence, plaintiff argues that "those chilies which are merely similar do not fall within the common usage of the term Anaheim."

Plaintiff insists that, because of Mr. Gonzalez' long commercial experience in the buying and selling of chili peppers, his testimony should be accorded greater probative value than that of defendant's witness which is based upon scientific meaning which differs from common meaning. Finally, plaintiff submits that the record establishes that the merchandise at bar was invoiced as "Chili Seco Chilaca," and that it was personally sampled and identified by Mr. Gonzalez as being chilaca chili peppers. In this setting, plaintiff contends that it has made a *prima facie* showing that the common meaning of the term "anaheim" chilies does not embrace the imported merchandise.

Defendant emphasizes that inasmuch as Mr. Gonzalez is president of the plaintiff corporation he is an interested witness. Therefore, his testimony is not free from bias, and should be accorded considerably less weight than the testimony of Dr. Nakayama, who is an independent expert. Additionally, the defendant insists that the testimony of Mr. Gonzalez concerning several essential areas in controversy has damaged his entire credibility. In support of this contention, defendant points to the testimony of Mr. Gonzalez in connection with the Petoseed exhibit. It submits that, while it was introduced by plaintiff for the purpose of illustrating that the college 64L and the chilaca chili peppers are the same, as testified by its witness, an examination of the exhibit shows no reference at all to chilaca chilies. Furthermore, on cross-examination, Mr. Gonzalez

admitted that there is no reference in the exhibit that the college 64L pepper is called a chilaca. It is noteworthy that Dr. Nakayama testified that he developed the college 64 pepper, that the college 64L pepper is a strain of the college 64 pepper, and that the college 64L pepper was developed by the Petoseed company. Moreover, Dr. Nakayama testified that the college 64L pepper belongs to the "Anaheim, California" group of chili peppers.

An additional factor undermining the testimony of Mr. Gonzalez, asserts the defendant, is his unsatisfatory attempt to explain the conflict in the description of the imported merchandise on the invoices with that in the contract of purchase and the bank guarantee to the growers. As to this, defendant points to his testimony on cross-examination as follows:

> "Q. Referring back to Exhibit A, Mr. Gonzalez, you testified this covers Pasillas and California. Would you tell the Court what the California is, in that exhibit?—A. Which exhibit?
> Q. Exhibit A, your contract of purchase.—A. Well, California, in the State of Northern Lower California, the farmer calls the Chilaca chili, California, and he made the contract and then he invoiced on the base of California, or Chilaca."

Plaintiff failed to produce any evidence to support the explanation of its witness that the chilaca chili pepper is called "California" by the farmer. Moreover, this explanation was categorically refuted by Dr. Nakayama who testified that the terms "California" and "Anaheim" chili peppers are synonymous. Hence, the use of the words "chili * * * California" in the contract of purchase is clearly an admission against plaintiff's interest.

Defendant's exhibits B and C are bags of chili peppers consisting of official samples taken from entry Nos. 127253 and 127361 by Import Specialist Thomas T. Gallagher. These samples were bagged and marked by Mr. Gallagher, and kept in dry storage in Customs' sample locker in San Ysidro for almost a year. The pepper samples were not withdrawn from shipments that are before the court, nor are they representative of the imported merchandise in this action. Mr. Gallagher, called by the defendant as a witness, testified that at Customs he worked with the team that handled plaintiff's line of chili importations. He was familiar with the classification of peppers, and particularly those in defendant's exhibits B and C. He identified the merchandise in these exhibits as coming from shipments for the account of Thomas P. Gonzalez Corp., and testified that on the invoices they were described as "Chilaca," or Chilaca, field run." Although these chili peppers were invoiced as "Chilaca," or "Chilaca, field run," they were identified by Mr. Gonzalez as anaheim chili peppers.

In view of the above, defendant maintains it is apparent that plain-

tiff's witness was unable to discern any distinctions in the peppers in exhibits B and C which would enable him to identify them as chilaca chilies. Moreover, his testimony establishes that even if the imported chili peppers were known as chilaca chilies in Mexico, they would nevertheless, be embraced by the term "anaheim," as set forth in item 161.80 of the tariff schedules.

Careful research reveals that the question presented appears to be of novel impression. It also discloses that there is a paucity of the usual tools or material which aid the court in understanding the nature and characteristics of the merchandise in issue, such as dictionaries, scientific authorities, and other reliable sources, including legislative history and background.

Turning to judicial enlightenment on the classification of dried, unground chili peppers, the court has found one prior judicial determination. While neither of the parties has relied upon the case in support of its position, several aspects, may, nevertheless, provide some guidance here. The case is *Rudolph Miles & Sons, Inc., a/c Thomas P. Gonzalez Corp.* v. *United States*, 79 Cust. Ct. 45, C.D. 4711 (1977), in which the testimony bearing on the issue in question was supplied by the same expert witnesses as in the present case, Mr. Gonzalez on behalf of the plaintiff, and Dr. Nakayama on behalf of the defendant.

In the *Rudolph Miles* case, the dried, unground chili peppers, exported from Mexico, were classified under TSUS item 161.80, the provision for "anaheim and ancho" peppers. The importer claimed that the imported merchandise was properly classifiable as "other" than anaheim and ancho peppers, under TSUS item 161.83. It was conceded by the parties that the merchandise in that case was not anaheim peppers. The question presented therefore was whether the imported peppers were "anchos," as contended by the government, or "pasillas," as claimed by the importer. The court observed that shape and size were admittedly dominant factors in the identification of varieties of chili peppers; that although the evidence in the record was conflicting for the most part, the parties did agree that the ancho variety of chili peppers is characterized by a wideness in body. Indeed, it is called "ancho" because of its shape, the term meaning "wide" in Spanish. The court found that the official samples from the imported peppers revealed a wideness in shape and size that was in conformity with the standard description for ancho peppers, whereas, samples presented by the importer and allegedly taken from the importations before the court revealed a narrowness in shape and size, in conformity with the standard description for pasilla peppers. Relying on the official samples, and the standard description as to size and configuration of the chili peppers contained in the evidentiary exhibits, the court held that the classification of the imported chilies as ancho peppers was

supported by the evidence, and that plaintiff failed to rebut the correctness of the classification.

It is clear from the foregoing that, in determining the correct identification of the variety of the controverted chili peppers, the physical examination of the samples by the court served not only to corroborate the testimony of the witnesses as to their size and configuration, but found support in the standard description of the ancho pepper as supplied by the evidentiary exhibits.

In the case at bar, the parties are not in agreement that the anaheim or chilaca chili pepper is characterized by a particular "wideness," or "narrowness," in body. Nor is it contended by either party that size and shape configuration are the dominant characteristics in the identification of the variety of chili peppers. Furthermore, the testimonial evidence reveals that Mr. Gonzalez testified that the level of maturity of a pepper when it is picked will affect its size. It was also stated by Dr. Nakayama that anaheim peppers vary considerably in size and shape depending upon the area in which they are grown, and that the variety of chili peppers is difficult to determine without regional information. Under these circumstances, it is apparent that without evidence of relationship with the foregoing factors, and none has been adduced by the parties, the samples contained in exhibits 1 and 2 are of little probative value in determining the asserted differences in size, color and pungency between the anaheim and chilaca chili peppers.

Worthy of particular note is the following dictum in *Rudolph Miles:*

> "Moreover, in case of the peppers covered by entry 110939 dated January 29, 1974 of protest 74–11–03241, plaintiff has introduced through Mr. Gonzalez samples which are likewise *said* to be taken from this entry and designated as exhibit 4. However, these samples, characterized by the witness chilaca chilies, exhibit even a starker contrast in terms of size and shape whem compared with exhibit C. A typical specimen from exhibit 4 measures ½ inch at its widest point, and 2¾ inches in length, is flat and, is colored dark red." 79 Cust. Ct. at 49. Emphasis in original.)

This court has examined the samples in exhibits 1 and 2, characterized by Mr. Gonzalez as chilaca chilies, and has noted the physical differences between them and those characterized by Mr. Gonzalez as chilaca chilies in the *Rudolph Miles* case. The examination by the court in *Rudolph Miles* disclosed that a typical specimen from the samples characterized by Mr. Gonzalez as chilaca chilies measured ½ inch in diameter at its widest point, whereas a typical specimen of the chili peppers characterized by him as chilaca in exhibits 1 and 2, measures ½ inches or more in diameter at its widest point. These measurements show substantial differences in the size of imported chili peppers characterized by Mr. Gonzalez as chilaca. It is obvious that the weight

to be accorded to the testimony of plaintiff's witness, that the imported merchandise is chilaca and not anaheim chili peppers, has been seriously impaired.

Plaintiff maintains that in addition to the identification of the imported merchandise as chilaca chili peppers by Mr. Gonzalez, it was designated on the invoices as "Chili Seco Chilaca.

It is well settled that while the invoice description of imported goods may have evidentiary value, it does not finally fix the status, nature or character of an importation. *United States* v. *Rotberg & Krieger*, 24 CCPA 441, 445–46, T.D. 48902 (1937); *Hawley & Letzerich et al.* v. *United States*, 19 CCPA 47, 54, T.D. 44893 (1931); *Prosser* v. *United States*, 1 Cust. Ct. Appls. 29, 31, T.D. 30850 (1910); *The Mundo Corp. et al.* v. *United States*, 56 Cust. Ct. 303, 310, C.D. 2640 (1966). Furthermore, the record shows that the nomenclature on the invoices is at variance with that in the contract of purchase and the bank guarantee to the growers. Additionally, the record discloses that Mr. Gonzalez' explanation of this discrepancy is in direct conflict with that of Dr. Nakayama. Even apart from the question of credibility, it is evident that regional confusion exists with respect to the terminology employed in the chili pepper industry. Under these circumstances it is clear that the invoice description or designation is devoid of any probative value.

Plaintiff's reliance on the literature in evidence, to support the testimony of its witness as to the essential differences between the anaheim and chilaca chili peppers based upon pungency and country of origin, is misplaced. These factors, *per se*, are not germane to the determination of the issue presented, and, even if true, would not preclude the imported merchandise from inclusion within the common meaning of the term "anaheim."

The court does not agree with plaintiff's argument, in its brief, that exhibit 4, the Petoseed catalogue, illustrates the high degree of physical similarity between the anaheim and the college 64L chili peppers, and, therefore, corroborates Mr. Gonzalez' testimony that "the latter variety is synonymous with the chilaca chili grown in Mexico." Plaintiff suggests that implicit in this contention is the premise that, since it appears from the illustration that their differences are subtle, an accurate identification of the varieties of peppers requires the intimate familiarity uniquely possessed by Mr. Gonzalez. The fallacy with this agrument is that an examination of pages 38 and 39 of the Petoseed catalogue, entitled *Standard-Peppers-Hot*, reveals that there is no-reference in those pages to the chilaca chili pepper, either by illustration, description, or otherwise.

Beyond this, Dr. Nakayama testified that he is familiar with the college 64L chili pepper; that he has observed it in various field plant-

ings; that he has worked with it and knows it was developed by the Petoseed company. Furthermore, Dr. Nakayama stated that the college 64L pepper is considered a strain of the college 64 pepper which he developed, and that it belongs in the same category as the "Anaheim, California" chili.

The court does not agree with plaintiff's contentions on the classification of the imported merchandise, and gives credence to the testimony of Dr. Nakayama, the defendant's witness. Dr. Nakayama has demonstrated that he is well qualified to testify on the classification question presented, and that his testimony is authoritative, reliable, and credible. To overcome the presumption of correctness which attaches to the classification of the imported merchandise, and the opposing testimony and evidence of record, plaintiff has submitted the personal and self-serving opinion of its president, Mr. Gonzalez. Other than the unsupported personal opinion of Mr. Gonzalez, plaintiff has offered no testimony to establish that the imported merchandise is not embraced within the common meaning of the term "anaheim" as used in item 161.80 of the tariff schedules.

The defendant, on the other hand, did not merely rely upon the statutory presumption of correctness, but submitted competent, reliable and credible affirmative evidence, which the court has found persuasive, to support the presumption that the imported merchandise is within the common meaning of the term "anaheim" within item 161.80 of the tariff schedules.

Based upon a physical examination of the chili pepper samples exemplified in plaintiff's exhibits 1 and 2, Dr. Nakayama testified clearly that the imported merchandise belonged to the anaheim or California type or group of chili peppers. He also stated that the size, shape, pungency and color of chili peppers are peculiar to the area in which they are grown, and that they can vary considerably from area to area depending upon climatic and environmental conditions. Furthermore, although he has traveled in both Mexico and the United States, he has never heard the term "chilaca" applied to a variety of chili peppers.

Plaintiff, in its brief, urges that "should the court conclude that the common meaning of anaheim chilies encompasses the merchandise * * * it has presented evidence sufficient to establish a commercial meaning and such designation must take precedence." Plaintiff submits that the subject merchandise does not fall within the purview of the commercial designation for anaheim chili peppers.

Insofar as plaintiff claims a commercial designation for the term "anaheim" chilies, plaintiff has the burden of establishing that, as used in the trade at the time of the enactment of the tariff schedules, that term had a meaning which was general (extending over the entire

country), definite (certain of understanding), and uniform (the same everywhere in the country). *Moscahlades Bros., Inc.* v. *United States*, 42 CCPA 78, C.A.D. 575 (1954); *United States* v. *M. & D. Miller, Inc.*, 41 CCPA 226, C.A.D. 556 (1954); *Nylos Trading Co.* v. *United States*, 37 CCPA 71, C.A.D. 422 (1949). Thus, the rule of commercial designation "was intended to apply to cases where the trade designation is so universal and well understood that the Congress, and all the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted." *Jas. Akeroyd & Co. et al.* v. *United States*, 15 Ct. Cust. Appls. 440, 443, T.D. 42641 (1928). See also *United States* v. *Fung Chong Co.*, 34 CCPA 40, 42, C.A.D. 342 (1946).

In support of its position, plaintiff points to the nationwide experience of Mr. Gonzalez in the buying and selling of chili peppers. It argues, therefore, that when he describes the distinctions between the anaheim and chilaca chili peppers, such description can be said to be general because of its wide circulation in commerce. Plaintiff also contends that the term "anaheim" has definite application as demonstrated by the specific illustrations and descriptive data in plaintiff's exhibit 4 and defendant's exhibit E, published by commercial seed companies. Finally, the plaintiff urges that the nationwide scope of the literature, and the testimony of its witness, "highlights a uniform understanding throughout the country."

Implicit in the rule of "commercial designation" is the premise that the trade understanding of the tariff term differs from the common meaning. Stated otherwise, the doctrine has no application where the commercial and common meanings are the same. *Stephen Rug Mills* v. *United States*, 32 CCPA 110, C.A.D. 293 (1944); *Draeger Shipping Co.* v. *United States*, 15 Ct. Cust. Appls. 190, T.D. 42234 (1927).

It is to be noted that plaintiff's posture concerning the issue of commercial meaning has been equivocal. Thus, in its complaint, and at the trial, plaintiff presented no claim or evidence of a commercial designation that differed from the common meaning of the term "anaheim" chili peppers. However, in its post trial brief, plaintiff for the first time suggests the possibility that the commercial meaning of the term in issue is basically different from its common meaning.

Nevertheless, based on the present record, the plaintiff has failed to sustain its burden of establishing a commercial meaning different from the common meaning of the term "anaheim." With respect to proof of the fundamental elements of commercial designation, the record is almost entirely limited to the experience of Mr. Gonzalez in the buying and selling of chili peppers. Indeed, the pronounced differences, among other things, in the nomenclature, distinctions, and characteristics of anaheim chili peppers, offered by both of the

expert witnesses, demonstrate that there was no definite, general, and uniform trade understanding of that term. The record falls far short of establishing, by competent evidence, that the merchandise at bar is generally, uniformly and definitely recognized throughout the trade in this country by a commercial designation which would preclude its classification as anaheim peppers under item 161.80 of the tariff schedules.

For all the foregoing reasons, it is the determination of the court that the presumption of correctness attaching to the classification by Customs has not been overcome, and the action is dismissed.

Judgment will enter accordingly.

(Slip Op. 81–109)

DANT & RUSSELL INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80–9–01473

Before FORD, *Judge.*

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

[Judgment for defendant.]

(Decided November 23, 1981)

Glad & White (*Edward N. Glad* of counsel) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Robert H. White* on the brief), for the defendant.

FORD, *Judge:* This action presents for determination the proper classification, for customs duty purposes, of certain hardwood flooring. The entries covering the importations involved were originally liquidated as presently claimed. The oak flooring was liquidated under item 202.56, TSUS, while the birch and maple flooring were liquidated under item 202.58, TSUS. Customs voluntarily reliquidated the entries within the time prescribed by 19 U.S.C. § 1501 under item 202.60 as other wood flooring.

The imported merchandise, known as "Miyata-Plank" is hardwood manufactured to accurate dimensions, measuring 15mm x 1′ x 6′, precision edge tongued, grooved and end notched. It is manufactured by gluing oak, maple or birch to 5-ply lauan substrata and is used for wood flooring.

Plaintiff's motion for summary judgment is predicated upon facts contained in the affidavit of Kit Draham, manager of the import department of plaintiff corporation, and a catalog sheet attached thereto. Defendant's cross motion for summary judgment is supported by affidavits of A. M. Baldassarri, vice president of Pan Pacific Overseas, an importer of wood products, and Paul Garretto, National Import Specialist at New York. In addition, defendant offered four samples of the imported merchandise as well as descriptive materials which were supplied by plaintiff. Defendant alternatively contends if any issue of fact is raised by the affidavits the motions of the parties should be denied and the matter set down for trial.

The classification (actually the reclassification) under item 202.60, *supra*, carries with it the presumption that the imported merchandise consists of wood flooring within the language contained in the superior heading preceding items 202.56–202.60 which reads as follows:

	Wood flooring, whether in strips, planks, blocks, assembled sections or units, or other forms, and whether or not drilled or treated (except softwood flooring classifiable as lumber):	
	Hardwood flooring in strips and planks, whether or not drilled or treated:	
202.56	Oak (*Quercus* spp.)	3.5% ad val.
202.58	Other	Free
	* * * * * * *	
202.60	Other	7.4% ad val.

In view of the foregoing, the sole issue of law presented by plaintiff is whether the imported flooring consists of strips or planks. Defendant contends the imported merchandise consists of plywood flooring and, as such, is subject to classification under item 202.60, *supra*. Defendant alleges further that the classification is supported by the legislative history.

Plaintiff upon *D. B. Frampton & Company, Dorf International, Inc.* v. *United States*, 60 Cust. Ct. 4, C.D. 3243 (1968), which held certain maple flooring to fall within the purview of item 202.57, TSUS. The merchandise was in plank form, assembled from strips fitted together and fastened laterally and machined to exact dimensions. The flooring was both tongued and grooved. It was used exclusively for railroad car flooring and known in the railroad industry as plank flooring. Accordingly, the court held the imported merchandise to be hardwood flooring in strips and planks, assembled sections or units or other forms. The court reasoned that the provision claimed being *eo nomine* in-

cluded, in the absence of legislative intent, all forms of the article as long as it is recognizable as such. Therefore, a plank, whether conventional or assembled, falls within item 202.57, *supra*. In addition, in *Frampton* the evidence established the merchandise was known as plank flooring or flooring plank and the government conceded it was in plank form.

The supporting affidavits for the motion and cross motion are contradictory. However, the legislative history is supportive of the classification and is set forth in the *Tariff Classification Study*, Schedule 2, page 22, as follows:

> Item 202.60 covers "other" wood flooring (except softwood flooring classifiable as lumber). This provision is derived from paragraphs 402, 404, and 412. This flooring is in blocks, assembled sections or units, or other forms, and includes short strips of accurately milled wood, either separate, in sets, or assembled in sections for parquet and similar types of patterned floors. It also includes preassembled sections of strip flooring.

Additionally, further support of the classification is found in the *Summaries of Trade and Tariff Information* (1967), Schedule 2, Volume 1, pages 117–118:[1]

> Laminated block flooring is essentially a small square of plywood (i.e., laminated veneers), often 9 x 9 inches and $^{15}/_{32}$ inch thick. Assembled sections or units of block flooring, also provided for in item 202.60 consist of (1) sets of an even number of squares (unit or laminated) fastened together so that the grain of each square forms a checkerboard or parquetry pattern in the completed panel, and (2) sets of "slat-block" flooring, each set made up of four or more smaller squares formed from narrow slats or strips.

Representative samples of the imported merchandise may be considered potent witnesses. *Marshall Field & Co.* v. *United States*, 45 CCPA 72, C.A.D. 676 (1958). Examination of the imported merchandise and the facts relating to its construction is clearly indicative of the nature of this merchandise. The imported articles are laminated or plywood flooring. There is insufficient evidence to establish them to belong to the class or kind of flooring known as planks or strips. Since they are laminated, they fall within the purview of item 202.60, *supra*, as classified. Accordingly, plaintiff's motion for summary judgment is denied, and defendant's cross-motion is granted.

Judgment will be entered accordingly.

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[1] While not legislative history, the Summaries are useful as a guide of the administrative practice of the Customs Service.

(Slip Op. 81–110)

CONNORS STEEL COMPANY, PLAINTIFF *v.* THE UNITED STATES, DEFENDANT

Before WATSON, *Judge.*

Court No. 80–3–00478

Cross Motions For Review on the Administrative Record of a Determination by the Secretary of the Treasury That Imported Steel Beams Were Not Being Sold At Less Than Fair Value

In reaching his determination that certain steel beams from Belgium were not being sold here at less than fair value, the Secretary of the Treasury did not act in accordance with the law. He failed to extend the investigation to the question of whether sales in the foreign home market for home consumption (used to validate the sale prices to the United States) were at prices representing less than the cost of production. The Court's analysis of the Antidumping Act, particularly 19 U.S.C. § 164(b)(1976), and its review of the administrative record show that further investigation was required by the law.

[Remanded with instructions to the Secretary of Commerce]

(Decided November 24, 1981)

Harris, Berg and Creskoff (*R. Christian Berg* on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Branch Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the brief) for the defendant.

Graubard Moskovitz McGoldrick Dannet and Horowitz (*Michael H. Greenberg* and *Charles L. Rosenzweig* on the brief) for *amicus curiae* Cockerill-Sambre, S.A. and Cockerill-Stinnes Steel Corporation.

WATSON, *Judge:* The plaintiff, Connors Steel Corporation (Connors), brought this action under 19 U.S.C. § 1516(d) (1976) to contest a final determination made by the Secretary of the Treasury in September of 1979 [1] that certain steel I-beams from Belgium were *not* being sold here at less than fair value. That determination ended an investigation under the Antidumping Act of 1921, as amended, 19 U.S.C. § 160, et seq., (1976). The investigation had begun in February of 1979, following a petition by Connors alleging that importations of steel beams were being sold in the United States at less than fair value and were

[1] 44 Fed. Reg. 54579–81. Under the statute, the investigation of whether the sales were at less than fair value had two stages, a tentative determination (which normally had to be made within six months) and a final determination within three months thereafter. In this proceeding, the tentative determination was made in four months and the final determination followed three months later. At both stages, the Secretary of the Treasury concluded that sales were not being made at less than fair value.

causing injury to a United States industry. The subject of the petition and the investigation were steel I-beams manufactured in Belgium by Cockerill-Ougree-Providence et Esperance-Longdoy, S.A. (now Cockerill-Sambre, S.A.).[2]

The matter is now before the Court for decision on cross motions for judgment on the administrative record under Rule 56.1 of the Rules of the Court. An *amicus curiæ* brief has been filed by the manufacturer of the beams, Cockerill-Sambre S.A. (Cockerill) and the importer, Cockerill-Stinnes Steel Corporation (CSSC).

The investigation of whether this class of articles was being sold here at less than fair value was the first part of the process of determining whether antidumping duties should be assessed. If sales at less than fair value had been found, the matter would have gone to the International Trade Commission for a determination of whether the relevant industry had been injured. 19 U.S.C. § 160(a) (1976).[3]

The Secretary's conclusion was based on a finding that the sale price to the United States was not less than the price in the Belgian home market for home consumption. Reference to the home market sales in Belgium for vindication of the fairness of the sale price to the United States was based on the following sequence of provisions in the statute: 19 U.S.C. § 160(c)(1) (1976)[4] mandated an investigation of whether the sales to the United States were at less than fair value. 19 U.S.C. § 160(b)(1)(A) (1976)[5] stated the obligation to determine whether the price was less than foreign market value. This in turn led

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[2] The beams were identified as hot-rolled steel I-beams, with symmetrical flanges or with one or more flanges offset, less than six inches in height and weighing not over 4½ pounds perlinear foot. They were further identified as being provided for under Item 609.80 of the Tariff Schedules of the United States.

[3] § 160. *Foreign merchandise sold or likely to be sold at less than fair value:*

(a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a less than its fair value, he shall so advise the United States International Trade Commission (hereinafter called the "Commission") and the Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160 to 171 of this title called a "finding") of his determination and the determination of the Commission.

[4] (c)(1) The Secretary shall, within thirty days of the receipt of information alleging that a particular class or kind of merchandise is being or is likely to be sold in the United States or elsewhere at less than its fair value and that an industry in the United States is being or is likely to be injured, or is prevented from being established by reason of the importation of such merchandise into the United States, determine whether to initiate an investigation into the question of whether such merchandise in fact is being or is likely to be sold in the United States or elsewhere at less than its fair value. If his determination is affirmative he shall publish notice of the initiation of such an investigation in the Federal Register. If it is negative, the inquiry shall be closed.

[5] (b)(1) In the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, he shall, within six months after the publication under subsection (c)(1) of a notice of initiation of an investigation—

(A) determine whether there is reason to believe or suspect, from the invoice or other papers or from information presented to him or to any other person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value);

to 19 U.S.C. § 164(a) (1976)[6] which, broadly speaking, defines foreign market value as the price for home consumption.

Plaintiff argues that various aspects of the decision were not supported by substantial evidence and were not done in accordance with the law.[7] It began by attacking the determination of home market sales in Belgium on four grounds: first, for an alleged failure to investigate whether the sales were actually for home consumption; second, for allegedly not being directed at sales which were on a "level of trade" comparable to the sales to the U.S.; third, for including sales to a related company; and fourth, for being so small in number as to be inadequate for purposes of comparison.

The Court finds no deficiency in these four aspects of the administrative determination. The responses of Cockerill and the destinations shown on some of the supporting invoices were sufficient to substantiate the finding that sales of these articles were made for home consumption in the Belgian market as required by 19 U.S.C. § 164(a). In the absence of any contrary or inconsistent information there was no obligation to probe more deeply on this point.

Secondly, the necessity to investigate whether a difference in "levels of trade" existed between the Belgian sales and the U.S. sales did not arise. The statute requires that the home market sales used for comparison must be in the usual wholesale quantity and in the ordinary course of trade. 19 U.S.C. § 164(a) (1976). The response from Cockerill that its prices in the two markets did not vary according to class of purchaser and that it did not offer quantity discounts was sufficient, absent any conflicting information, to make further investigation on this point unnecessary. The mere fact that average quantities were lower in the sales in Belgium does not contradict a finding that the sales were comparable under the statute.

Thirdly, as to the fact that 50 percent of the home market sales were to a related company, it need only be stated that the law does

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[6] § 164. *Foreign market value:*

(a) For the purposes of sections 160 to 171 of this title the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantity and in the ordinary course of trade for home consumption (or, if not sold or offered for sale for home consumption, or if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of sections 160 to 171 of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 165 of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

[7] The Court had previously determined that this would be the standard of review. *Connors Steel Co.* v. *United States*, 1 CIT ——, Slip Op. 81-3 (1981).

not remove sales to a related purchaser from consideration as part of home market sales. Common sense, of course, would indicate that strictly by themselves sales to a related purchaser would be a questionable guarantee of a fair home market price. However, if they are made at the same price as sales to independent purchasers, there is no reason why they cannot form part of the total quantity of home market sales used as a benchmark.

Fourthly, in the abstract there is no defect in the amount of sales relied on by the Secretary. The total sales for home consumption amounted to 6 percent of sales for export to countries other than the United States. Although this percentage is at the lower end of the scale, the Court cannot say that it would be an inadequate basis for comparison as a matter of law under 19 U.S.C. § 164(a) (1976). However, these are small percentages and the relative narrowness of the base they provide means that the possibility of a need for further investigation could not be foreclosed. When it is realized that the entire calculation ultimately depends on the 3 percent of sales represented by sales to independent parties, the fragility of the comparison is troubling, if not defective.

This brings the Court to plaintiff's most effective argument. Plaintiff attacks the Secretary's failure to investigate whether home market sales were below cost of production as provided for in 19 U.S.C. § 164(b) (1976). That provision reads as follows:

> (b) Whenever the Secretary has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, he shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the Secretary determines that sales made at less than cost of production (1) have been made over an extended period of time and in substantial quantities, and (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade, such sales shall be disregarded in the determination of foreign market value. Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than cost of production, are determined to be inadequate as a basis for the determination of foreign market value, the Secretary shall determine that no foreign market value exists and employ the constructed value of the merchandise in question.

Although the Court agrees that the duty described in this provision did not arise here at the very beginning of the investigation, at a later stage it became unavoidable. The original petition focused on the overall necessity for a "less than fair value" determination. As

will be further discussed, it contained some information which could have justified investigative suspicion of Cockerill's home market sale price. However, at that stage, the Court does not believe it is reasonable to posit a general duty of the agency to independently explore all the implications of the information supplied.

The sequence of events which gave rise to the duty to extend the investigation to Cockerill's cost of production occurred after the June 13, 1979 tentative determination that sales to the United States had not been made at less than fair value. 44 Fed. Reg. 33997 (1979).

Approximately 51 days before the date of the final decision, plaintiff for the first time called the attention of the agency to the necessity for a cost of production determination. In a pre-conference brief filed on July 24, 1979 it argued that the Customs Service had erred in not going beyond its examination of sales in Belgium to investigate the possibility that those sales were at less than cost of production. [Document 80 in the Public File] It cited in support its allegations that Cockerill's production was subsidized and it supplied information tending to show that Cockerill's sale price was below Connors' cost of production. At an administrative hearing on July 31, 1979 Connors added as support for the necessity of a cost of production determination an argument based on a constructed trigger price which it had included in its original petition. It reasoned that if Cockerill's sale price was below a constructed trigger price it was presumptively below its cost of production.

The final determination of the Secretary addressed these matters as follows:

> Counsel for petitioner has claimed that Customs should have investigated the possibility of sales below the cost of production within the meaning of section 205(b) of the Act [19 U.S.C. § 164(b)], based, *inter alia*, upon petitioner's allegation of subsidization from the Government of Belgium and the European Communities. An allegation of subsidization does not adequately place in issue sales below the cost of production under the Antidumping Act; to the contrary, to the extent a producer's production or sales are subsidized, *its* cost of production may be lessened or its sales revenues increased. Other information presented by counsel for petitioner relevant to the cost of production of certain steel I-beams from Belgium, was presented too late to be considered.

The Court finds that when plaintiff brought the attention of the agency to the need for a cost of production determination, the agency had a reasonable basis to believe or suspect that sales in the home market were at prices representing less than the cost of production. It had a statutory duty to inquire further, and sufficient time to do so. That duty could not be avoided except for the most compelling reasons and the unsupported assertion that it was too late is entirely inade-

quate. The impossibility of completing the investigation must be substantiated in the record. Consequently, the Secretary's failure to investigate further was not in accordance with the law.

The government argues that Connors presented no evidence directly from Cockerill's costs. This suggests an ingenuous and erroneous standard for proceeding with a cost of production inquiry. On its face, it is unreasonable to expect a party to produce data directly from the costs of production of a competitor. There were at least two significant pieces of information relied on by Connors, and one supplementary matter contained in the record, which provided more than a reasonable basis to proceed.

In urging a cost of production inquiry, Connors relied on a "trigger price" which it had constructed from the government's trigger price for slightly larger beams. It had earlier used this material in its petition as general support for a dumping investigation. The government's trigger price was a device established to monitor imports of steel. 42 Fed. Reg. 65215. It was based on the costs of production of Japanese steelmakers who are considered to be the most efficient steel producers in the world. Prices lower than the trigger prices were to be subject to an increased likelihood of investigation for possible dumping. See generally, *Davis Walker Corporation* v. *Blumenthal*, 460 F. Supp. 283 (D.D.C. 1978). Connors modified the trigger price for similar beam by adding extra charges to account for the lighter weight, shorter length and greater strength of these beams. The methodology it utilized is plausible and the resulting conclusion is certainly sufficient to raise the question of whether Cockerill's home market price was below what would be the cost of production of the world's most efficient producers.

The government argues that even assuming the legitimacy of this constructed "trigger price," it would have no purpose other than to increase the likelihood that an antidumping investigation would be started, and should be discarded after that. This, however, is an unjustifiably restrictive view. We are not concerned here with the narrow purpose for which trigger prices were created but rather with the permissible inferences and suspicions to which they may give rise. It is plainly suspicious to find a sale price which may be below the cost of production of the world's most efficient producers. Obviously this does not prove that the price was below Cockerill's cost of production, but it does represent a reasonable basis to extend an investigative process.

In addition, Connors offered proof of its own costs of production to show, in conjunction with its claim to approximately the same

efficiency of production,[8] that Cockerill's sale price was below Connors' cost of production. From this, it would not be unreasonable to surmise that costs and efficiencies of production being approximately equal, Cockerill was selling at a price below its cost of production.

One other piece of information was in the administrative record but was not pointed out or discussed until this judicial review. A general statement appears in Cockerill's 1977 Annual Report that on various occasions, in order to maintain activity in its plants, it had accepted orders whose price did not cover fixed production expenses. [Public Document No. 65, p. 14] Although the government is correct in saying that this does not prove anything about the specific transactions at issue, it certainly should have contributed to the level of investigative curiosity.

When the preceding points are considered in conjunction with the relative sparsity of the home market sales upon which the Secretary relied and the rigorous investigative mandate of the statute, the conclusion becomes irresistible that the investigation should have continued into cost of production.

As a whole this statute displays a notable encouragement to the exercise of investigative powers and authority on minimal information. The entire determination of whether sales are being made at less than foreign market value or home market value is based on whether there is reason to believe or suspect that to be the case. 19 U.S.C. § 160(b)(1)(A) (1976).

The duty expressed in 19 U.S.C. § 164(b) (1976) to go beyond home market sales for comparison purposes arises during the course of an ongoing investigation. It represents merely an incremental development in the investigation, which ought to require less justification than is required to begin the investigation itself. In fact, the standard expressed is one which is distinctly conducive to proceeding on the basis of conjecture. It is even less than the probable cause needed for a search warrant and closer to the standard which allows a party to make discovery in a judicial proceeding. See generally, *De Masters* v. *Arend*, 313 F. 2d 79, 88 (9th Cir. 1963) *cert. dismissed* 375 U.S. 936 (1963). See also, *United States* v. *Powell*, 379 U.S. 48, 57 (1964).

Congress added the duty to investigate cost of production out of a keen awareness of the fallibility of home market sales prices. In its explanation of the amendment adding 19 U.S.C. § 164(b) to the Trade Act of 1974, the Senate Finance Committee stated:

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[8] In its administrative complaint Connors claimed greater efficiency in the melt stage, for its continuous cast billet system and higher worker productivity. It acknowledged an advantage to Cockerill in the hot rolling portion of production.

> The Committee is concerned that, in the absence of such a provision, sales uniformly made at less than cost of production could escape the purview of the Act, and thereby cause injury to United States industry with impunity. [9]

If anything, the administrative agency ought to be receptive to the need for a cost of production inquiry as the soundest possible verification in questionable circumstances. This is not an area in which the agency has broad discretion to refrain from investigating. That sort of discretion may exist in situations where the investigative methods are amorphous. See for example, *General Motors* v. *Federal Energy Regulatory Commission*, 613 F. 2d 939 (D.C. Cir. 1979). Here, however, Congress has seen fit to provide extremely detailed guidance for the commencement and conduct of the investigation.

There is nothing in the statutory scheme to show that a significant development or change in the investigation cannot take place in the final three-month period. There is nothing in the law which limits that final period to mere tinkering with the tentative determination and nothing to prevent the final determination from reaching a contrary conclusion.

When a reasonable basis was supplied the Secretary had a duty to investigate further. He could not set unreasonable standards by demanding direct proof and he could not refrain from investigating further simply because it was the second stage of the investigation or because of unsupported conclusions about what could be accomplished in the time remaining.

Before concluding, the Court touches on a few subsidiary matters. The government was correct in stating that the allegation that production was being subsidized did not give rise to an obligation to extend the investigation into cost of production. A subsidy would not imply that the sales are below cost of production and there is no authority for the elimination of a subsidy in calculating cost of production, as was proposed by plaintiff.

In a related matter, plaintiff's claim that the Secretary should have begun a countervailing duty investigation in response to the subsidy allegations made in this administrative proceeding is outside the scope of this review. This action is limited to a review of the antidumping investigation. The Secretary's obligations under other statutes are not before the Court.

The Court makes one final comment on the matter of subsidization. The Secretary's decision suggested that, if anything, subsidization would lessen cost of production. This reasoning was correct. However, if it implied that the existence of a subsidy is a factor which

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[9] S. Rep. No. 93-1298, 93d Cong., 2d Sess., 173 (1974).

will weigh against the conduct of an inquiry into whether a home market sales price is below cost of production, it must be criticized.

It is one thing to reject subsidization as a ground for probing cost of production. It is another thing to let it be a defense against the conduct of such a probe. In the latter case, it would offend public policy if conduct putatively in violation of the countervailing duty law served as a defense to the completion of an investigation under the antidumping law. For this reason the existence of a subsidy on production ought to have no part in the decision on whether to carry the investigation beyond home market sales. Of course, if the actual calculation of cost of production is reached, the relevant subsidies cannot be ignored.

For the reasons discussed earlier, the Court finds that the failure to extend the investigation in the manner prescribed by 19 U.S.C. § 164(b) was not in accordance with the law. The proper remedy is to require the correct completion of the administrative proceeding and not, as plaintiff suggests, to require a new proceeding entirely. However, since the Secretary of Commerce now has administrative responsibility in this area, the matter will be remanded to him.[10]

It is therefore Ordered that the Secretary of Commerce shall conduct an investigation into whether the sales of these beams in the home market were at prices representing less than their cost of production and shall report his findings to the Court within 120 days from the date of this decision.

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[10] The duties of the Secretary of the Treasury in these matters were transferred to the Secretary of Commerce pursuant to Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69275, 93 Stat. 1381, eff. Jan. 2, 1980, as provided by section 1-107(a) of Ex. Ord. No. 12188, January 2, 1980, 45 Fed. Reg. 993.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decision

DEPARTMENT OF THE TREASURY, *December 1, 1981.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P81/186	Boe, J. November 24, 1981	Corporation Sublistatica, S.A.	78-2-00249, etc.	Item 406.50 20%	Item 405.10 1.7¢ per lb. + 11%	Corporacion Sublistatica, S.A. v. U.S. (Slip Op. 81-6)	San Juan Dyes for transfer, ink powders, etc.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R81/441	Watson, J. November 25, 1981	American Thermo-Ware Co.	277277–A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/442	Watson, J. November 25, 1981	Astra Trading Corp.	260838–A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars

R81/443	Watson, J. November 25, 1981	Astra Trading Corp.	267774-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/444	Watson, J. November 25, 1981	Astra Trading Corp.	268952-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/445	Watson, J. November 25, 1981	Astra Trading Corp.	269636-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/446	Watson, J. November 25, 1981	Astra Trading Corp.	298190-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/447	Watson, J. November 25, 1981	Compass Instrument & Optical Co., Inc.	277537-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R81/448	Watson, J. November 25, 1981	Mitsubishi International Corporation	79-7-01136, etc.	American selling price	Appraised values less 23%, per pair	Agreed statement of facts	Los Angeles Footwear
R81/449	Watson, J. November 25, 1981	Samuel Brilliant Company	76-5-01176, etc.	American selling price	Appraised values less 20%, per pair	Agreed statement of facts	Boston Canvas footwear
R81/450	Watson, J. November 25, 1981	Samuel Brilliant Company	76-5-01181, etc.	American selling price	Appraised values less 20%, per pair	Agreed statement of facts	Boston Canvas footwear

Order Amending Memorandum and Order

NOVEMBER 6, 1981

NAKAJIMA ALL CO., LTD. *v.* UNITED STATES; Smith-Corona Group, Consumer Products Division, SCM Corporation, intervenor, Court No. 80–6–00933. On plaintiff's unopposed motion for clarification, memorandum and order, Slip Op. 81–95, dated October 26, 1981, amended to add the following:

WHEREAS,

(a) the information contained in Exhibits D and E to the "Response to Nakajima All, Ltd. to Antidumping Questionnaire" ("Response to Questionnaire") appears on pages 11 to 16 of the Response to Questionnaire;

(b) the Response to Questionnaire (including pages 11–16 and Exhibits D and E) is reproduced as Exhibit A to the "Reports of Investigation" contained in the confidential portion of the Record filed in this case by the Department of Commerce;

(c) Exhibit D is reproduced as Exhibit R to said "Reports of Investigation"; and

(d) Exhibits D and E may appear in other confidential documents;

defendant shall not disclose said information to intervenor, and, when making documents available to intervenor, shall indicate which documents have been redacted to exclude Exhibits D and E or the information contained therein.

Motion To Vacate and Dismiss

NOVEMBER 5, 1981

.SSOCIATED DRY GOODS CORPORATION *v.* UNITED STATES, Court No. 81–4–00375.—Quota on Wool Sweaters.—Slip Op. 81–70. Motion by defendant for an order vacating Slip Op. 81–70 and dismissing action for mootness in light of October 13, 1981 order of Court of Customs and Patent Appeals which remanded the causes covered by Customs Appeals Nos. 81–30 and 81–33 and arising from Slip Op. 81–70 to this court for further appropriate action.

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International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY, DECEMBER 10, 1981

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

WILLIAM VON RAAB,
Commissioner of Customs.

Investigation No. 701–TA–79

Notice of Suspension of Countervailing Duty Investigation Concerning Sodium Gluconate From the European Economic Community

AGENCY: United States International Trade Commission.

ACTION: Suspension of countervailing duty investigation on sodium gluconate from the European Economic Community (EEC).

SUMMARY: On November 24, 1981, the United States Department of Commerce notified the Commission that pursuant to section 704(f)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671c) it had suspended the countervailing duty investigation involving sodium gluconate from the European Economic Community. The basis for the suspension is an agreement between the Department of Commerce and Joh A. Benckiser (Benckiser), a manufacturer and exporter of sodium gluconate in the Federal Republic of Germany that accounts for substantially all of the imported merchandise. This agreement completely offsets the subsidy. As a result of this action by the Department of Commerce, the Commission is required by section 704(f)(1) (B) and (C) of the Tariff Act of 1930 to suspend its investigation effective on the date of publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Woodley Timberlake, Office of Investigations, telephone 202–523–4618.

SUPPLEMENTARY INFORMATION: On June 16, 1981, a petition was filed simultaneously with the Department of Commerce (the administering authority) and the U.S. International Trade Commission by Pfizer, Inc., alleging that sodium gluconate imported from the EEC benefits from the payment or bestowal of bounties or grants within the meaning of the countervailing duty laws of the United States. On July 31, 1981, the Commission notified Commerce of its preliminary determination that there is a reasonable indication that an industry in the United States is materially injured, or threatened with material injury, by reason of the importation of the merchandise in question. On September 9, 1981, Commerce preliminarily determined that the EEC is subsidizing the manufacture, production, and exportation of sodium gluconate within the meaning of the countervailing duty laws. Commerce directed the U.S. Customs Service to suspend liquidation of entries of the merchandise entered, or withdrawn from warehouse, and to require a cash deposit, bond, or other security in the amount of $107.05 per metric ton (the estimated amount of the net subsidy) to be posted on this merchandise.

On October 30, 1981, Commerce published in the Federal Register a notice of proposal to suspend the investigation on the basis of an agreement proposed on behalf of Benckiser. The basis of the proposed suspension agreement was contained in a letter to Commerce dated August 14, 1981, in which Benckiser agreed to renounce all export restitution payments on sales of sodium gluconate to the United States effective August 18, 1981.

By order of the Commission.

Issued: November 30, 1981.

KENNETH R. MASON,
Secretary.

Investigation No. 104–TAA–5

Notice of Termination of Countervailing Duty Investigation Concerning Ski Lifts and Parts Thereof from Italy

AGENCY: United States International Trade Commission.

ACTION: Termination of countervailing duty investigation under section 104(b)(1) of the Trade Agreements Act of 1979, with regard to ski lifts and parts thereof from Italy.

EFFECTIVE DATE: November 30, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Miller, Office of Investigations, telephone number (202) 523–0305.

SUPPLEMENTARY INFORMATION: The Trade Agreements Act of 1979, subsection 104(b)(1), requires the Commission in the case of a countervailing duty order issued under section 303 of the Tariff Act of 1930, upon the request of a government or group of exporters of merchandise covered by the order, to conduct an investigation to determine whether an industry in the United States would be materially injured, or threatened with material injury, or whether the establishment of such an industry would be materially retarded, if the order were to be revoked. On March 28, 1980, the Commission received a request from the Delegation of the Commission of the European Communities for the review of the outstanding countervailing duty order on ski lifts and parts thereof from Italy (T.D. 68–288).

The Commission instituted an investigation on ski lifts and parts thereof from Italy on August 10, 1981 (46 F.R. 42220). A prehearing conference was held on October 1, 1981, however, no persons other than Commission staff attended or otherwise participated. On October 7, 1981, the Commission was notified by letter that Hall Ski–Lift Co., the original and only petitioner for the countervailing duty order, wished to withdraw its petition on ski lifts because of minimal imports from Italy in recent years.

There is no provision in the Trade Agreements Act of 1979, or in its legislative history, specifically permitting termination of a section 104(b) investigation. However, authority to terminate such investigations is implied under section 704(a) of the Tariff Act of 1930. Section 704(a) permits termination of countervailing duty investigations properly instituted under Title VII of the Tariff Act of 1930. Section 704(a) directs the Commission to solicit public comment prior to termination and approve termination only if it is in the public interest.

On October 19, 1981, the Commission published a notice in the Federal Register (46 F.R. 51326) requesting public comment by November 18, 1981 on the proposed termination of the Commission investigation on ski lifts and parts thereof from Italy. No adverse comments were received in response to the Commission's notice. Thus, the Commission deems it to be in the public interest to terminate this investigation in light of the withdrawal of the petition by the original petitioner and by lack of interest in the continuance of the investigation by any interested parties.

The Commission is therefore terminating its investigation (Inv. No. 104–TAA–5) under section 104(b)(1) of the Trade Agreements Act of 1979 on ski lifts and parts thereof from Italy (T.D. 68–288). The termination of this investigation has the same effect as a determination that an industry in the United States would not be materially injured or threatened with material injury, nor would the establishment of

such an industry be materially retarded, if the countervailing duty order were to be revoked.

In addition to publishing this Federal Register notice, the Commission is serving a copy of this notice on all persons who have written the agency in connection with this investigation and is also notifying the Department of Commerce of its action in this case.

By order of the Commission.

Issued: November 30, 1981.

KENNETH R. MASON,
Secretary.

(19 CFR 207.40)

Notice of Request for Public Comment on Termination of Countervailing Duty Investigation Concerning Compressors and Parts Thereof from Italy

AGENCY: U.S. International Trade Commission.

ACTION: Request for comments on proposed termination of countervailing duty investigation under section 104(b) of the Trade Agreements Act of 1979.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Reavis, Office of Investigations, telephone 202–523–0296.

SUPPLEMENTARY INFORMATION: The Trade Agreements Act of 1979, subsection 104(b)(1), requires the Commission in the case of a countervailing duty order issued under section 303 of the Tariff Act of 1930, upon the request of a government or group of exporters of merchandise covered by the order, to conduct an investigation to determine whether an industry in the United States would be materially injured, or threatened with material injury, or whether the establishment of such industry would be materially retarded, if the order were to be revoked. On March 28, 1980, the Commission received a request from the Delegation of the Commission of the European Communities for the review of the countervailing duty order on compressors and parts thereof from Italy (T.D. 72–122), notice of which was published on May 3, 1972, in the Federal Register (37 F.R. 8948).

The Commission received a letter on November 16, 1981, from Tecumseh Products Company, the original petitioner for the countervailing duty order, stating that it withdraws its request for the imposition of countervailing duties under the above-referenced countervailing duty order.

The legislative history of section 704(a) of the Tariff Act of 1930, as amended by the Trade Agreements Act, indicates that the Commission should solicit public comment prior to termination of an investigation and approve the termination only it if is in the public interest. In light of the Commission's duty to consider the public interest, the Commission requests written comments from persons concerning the proposed termination of the investigation on compressors and parts thereof from Italy. These written comments must be filed with the Secretary to the Commission no later than 30 days after publication of this notice in the Federal Register.

By order of the Commission.

Issued: November 27, 1981.

KENNETH R. MASON,
Secretary.

Investigation No. 751–TA–5

SALMON GILL FISH NETTING OF MANMADE FIBERS FROM JAPAN

Notice of Postponement of Public Hearing

AGENCY: United States International Trade Commission.

ACTION: Postponement of public hearing in connection with investigation No. 751–TA–5.

SUMMARY: Notice is hereby given that the United States International Trade Commission has postponed its December 17, 1981 public hearing in the subject investigation. A new hearing date and location will be announced.

FOR FURTHER INFORMATION CONTACT: Daniel Leahy, Office of Investigations, U.S. International Trade Commission, (202) 523–1369.

By Order of the Commission.

Issued: November 25, 1981.

KENNETH R. MASON,
Secretary.

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